Buffalo Law Review

Volume 10 | Number 3 Article 3

4-1-1961

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G. Graham Waite
University at Buffalo School of Law

PLEASURE BOATING IN A FEDERAL UNION

G. GRAHAM WAITE*

THE FACTUAL SETTING

BOATING for sport has fairly leaped into prominence in the years since World War II. Whereas there were only about 2 million recreational boats in use in the United States in 1939, the number had grown to 7,330,000 in 1958 and was estimated at 8 million in 1959.[1] About half this number are boats expressly designed for use with outboard motors; all but half a million are boats that may be used with motors or engines. Furthermore, as more pleasure boats have come into use, the size of their power plants has increased. In 1947 the average horsepower of motors sold was 4.7 and only 2 per cent of the motors sold that year had as much as 15 horsepower. In 1958 these figures had risen to 20.7 and 58 per cent respectively. No figures on the speeds attainable by pleasure craft have come to the writer's attention. Presumably, speed is increasing with the power plants in use. The recent development and popularity of waterskiing reinforces the presumption since boats must be operated at relatively high speeds for this sport to be possible. Thirty-seven million people participated in boating in 1958 and more than 39 million were expected to participate in 1959. Boaters spent over 2 billion dollars in 1958 for new and used boats, engines, accessories, safety equipment, fuel, insurance, docking, maintenance, launching, storage, repair and boat club memberships.

With rising numbers of power boats in use and with speed of operation rising, it is not surprising to find boaters becoming a safety hazard to themselves and to persons using the water for other recreational purposes, such as swimming or fishing. An average of 1200 boating fatalities occur each year.[2] In the year ending June 30, 1958, 375 people died in boating accidents that the Coast Guard investigated. The Coast Guard report of the accidents shows a total of 376 types of accidents represented, the most frequent being capsizing, 170; falling overboard, 48; and foundering, 42.[3] Of the types of vessels involved,

* Associate Professor of Law, University of Buffalo. The research for this article was largely performed as a part of the program of studies in water law undertaken by the University of Wisconsin Law School in cooperation with the United States Department of Agriculture, the opinions expressed in the article are solely those of the writer and are his responsibility.

1. Statistics in this paragraph pertinent to 1959, are taken from a letter from Peter M. Wilson, Exec. Asst., National Assn. of Engine and Boat Mfr's, Inc., to the writer, Oct. 13, 1959. Except where specifically noted other data is from Boating—1958, a statistical report jointly presented by National Assn. of Engine & Boat Mfr's., and Outboard Boating Club of America.

2. Report of the Interim Boating Committee to the 1959 Wisconsin Legislature, p. 2.

3. Yachting, Feb. 1959, pp. 147-148. The other types of accidents reported, and the number of each, are collision, 16; striking submerged object, 16; explosion and fire, 11; unknown, 11; intoxication, 8; unseaworthiness, 7; overloading, 7; skiing, 8 (Two entries appear, showing 5 and 3, respectively, with no explanation of the difference. Perhaps one represents death of the skier and the other death of the person towing the skier); natural death, 5; disappearance of vessel, 5; struck by propeller, 4; swimming from boat, 4; attempted rescue, 3; diving from boat, 3; suffocation, 3; and racing, insanity, struck by boat, speeding and gunshot wound, 1 each.

power boats are by far the most frequently encountered.[4] Vessels sometimes injure swimmers, or fishermen seated in anchored vessels. Apart from the safety hazards they pose, recreational boaters also infringe on each other's enjoyment and on the pleasure of non-boating water sportsmen simply from the facts that there are millions of them and they are not all playing the same games. Some are fishermen, either trolling or stationary; some are cruisers in inboard motorboats; some are sailboat enthusiasts or canoeists; some tow water skiers at high speeds; still others move slowly in houseboats. Not all these uses are compatible. The noise and wake of the water ski towboat probably spoils the fishing and may cause a fisherman's stationary rowboat to capsize. Slow moving vessels, especially sailboats with their dependence on wind velocity and direction for maneuverability, may be rammed or their occupants badly startled by a high speed boat. The reckless boater threatens the safety of all. As for water sportsmen not using boats, swimmers may be injured by motorboats; and beaches of smaller lakes may grow unsightly from the debris washed ashore by motorboats, thereby interfering with the enjoyment of the summer cottage owner or other shoreline user.

The Need for Control

Clearly the freedom of action of boaters and other water sportsmen must be limited in such a way as to minimize the extent to which each activity interferes with the others, in order to afford to each sportsman the optimum enjoyment of his sport possible. Failure to impose appropriate limitations will tend to destroy the sport of all, hence limitations are essential to give substantial value to freedom.[5] Probably most people today expect government to impose the regulations. However, with the dual state and federal systems of government in the United States, questions are inevitable as to the power of each to determine rights and duties in particular situations.

Should State or Federal Government Exercise Control?

Each government has strong interests that are jeopardized by chaotic conditions of recreational water use. State governments traditionally are concerned with safety of their residents and their property. They also are concerned with the economic prosperity of their people, as witness the practice of spending state money to publicize the virtues of a state for commercial activity and as a vacation spot. Vacationers spend substantial sums, and furthermore, spend money in regions that may be starved for income from other sources, since it is often true that the same features that make an area delightful for a vacation render it unsuitable for farming or industry. The

4. Yachting, supra note 3. The breakdown for the 1958 accidents was outboards, 156; inboards, 87; rowboats, 12; auxiliaries, 7; sailboats, 2; houseboats and canoes, 1 each.

5. Of course, the same need to allocate use of resources exists between water recreation generally and industrial, municipal and agricultural uses of water. Discussion of the problems of balancing these conflicting demands to use water is beyond the scope of this article.

states in the past have shaped law doctrines of civil and criminal liability for the consequences of conduct generally, with an eye toward protecting people and property from harm, and toward developing a prosperous economy as well. The same goals impel the states to apply their law to activity on waters within their borders.

The tangle of activities afloat suggests that safety and prosperity can be achieved only if watercourses are zoned to particular activities. Zoning is traditionally a province of local government. But where the activities controlled—water sports—are those of persons not residing in the locality where the activity is to be conducted, and where the asset making the activity possible—the state's watercourses—cuts across local governmental boundaries, zoning by the state seems essential if the comprehensive plan essential to lawful zoning is to be achieved. At the same time, watercourse zoning must tie into local zoning of land uses and depend on local support for its success. The local people and their governments have interests similar to those of the state in controlling recreational water use, but oriented toward the locality. If the people and their local officials do not understand its benefits then it may be expected that individuals who feel its bite may successfully press for loose administration, or amendment of its provisions. Therefore, the state must do its utmost to develop a wise zoning scheme, to educate the public to its advantages and to persuade local authorities to adopt the state provisions as part of their own zoning pattern. State claims to control water use are more accurately viewed as state and local claims combined and shaped by each other.

The interest the federal government has in the maintenance of order among recreational water activities is greater today than it once was. It has always been concerned with protecting interstate commerce from state harassment, but in years gone by this meant keeping watercourses open for travel by commercial vessels. Today the automobile and boat trailer enable boatsmen to pursue their sport in states other than their own. The manufacture and distribution of the billions of dollars worth of equipment and supplies they buy is interstate commerce, that depends for its prosperity on there being waters available on which these materials may be enjoyably used. To some extent the boaters engage in interstate boating. This, too, may afford an interstate commerce basis of federal jurisdiction to preserve safety and order afloat.

Another traditional area of federal law is admiralty, which primarily has concerned itself with commercial shipping but is applicable to pleasure vessels as well. As pleasure boats operate on waters plied by commercial craft too, uniformity of rules of the road and lighting requirements for vessels and some common minimum level of skill in operating pleasure boats is necessary to avoid increasing the hazards of commercial ship operation. Since the admiralty law seeks to allocate the liability for certain damage arising from those hazards

these matters are fair game for regulation by the maritime law if necessary to reduce the risks of maritime activity. Because the same pleasure boat that operates on waters where commercial shipping exists may also operate on waters free of commercial vessels the same rules of boating must apply on both waters to avoid dangerous confusion.

The extent of state and federal power to regulate water recreation may be outlined only with respect to specific facts and specific types of regulation. This article considers only the power to authorize recreational boating on inland waterways and to prescribe standards of conduct on water generally, and the power to zone waters to particular uses.

Power to Determine Waters on Which Recreational Boating May be Conducted

A. *Introduction*

Recreational boating is one of several activities comprising the public's rights to use certain streams and lakes. The determination of the activities within the public rights and the watercourses on which they may be exercised historically has been controlled by state law. The reason for this is that public rights in water are based on the common law of England. The common law pertaining to use of inland watercourses was received by the states in this country, not by the federal government, and the power to shape the content of common law rights is reserved to the states, except as it may be affected by powers delegated to the federal government and exercised by it.[6] The states' role in shaping rights to use lakes and streams today is still substantial, but today the federal government also exercises considerable control over boating on various waters. Federal control is accomplished directly through its power to regulate commerce among the several states,[7] and its power to alter and supplement the maritime law.[8] In addition, the federal power to determine which streambeds passed in title to the states created from the public domain and which did not, indirectly impinges on boating rights even within the thirteen original states.

Both state and federal courts have used the concepts of navigability in determining the impact of state and federal law on the various watercourses of the country. Thus, questions of title to the beds of watercourses in new

6. Martin v. Waddell, 42 U.S. 345 (1842); People v. New York and S. I. Ferry Co., 68 N.Y. 71 (1877). An excellent recent discussion of the common law origins of public rights and water and their development in the United States is by Professor Richard S. Harnsberger of the Univ. of Nebraska College of Law. See Harnsberger, The Present and Future Status of Public and Private Rights in Wisconsin's Waters (unpublished thesis in the University of Wisconsin Law School Library 1959) at 524-534. See also Waite, The Dilemma of Water Recreation and a Suggested Solution, 1958 Wis. L. Rev. 542, 567-577.

7. U. S. Const. Art. I, § 8.

8. This power has been inferred from United States Constitution Art. III, § 2, giving judicial power in admiralty cases to the federal courts. See Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21 (1934), discussed in Gilmore and Black, The Law of Admiralty 572-574 (1957).

states, of public rights to use lakes and streams, of application of federal laws enacted under the commerce power to regulate power dam construction or vessel navigation, and of application of the federal maritime laws have all been resolved by determining whether the waterway is navigable or not. These examples show that the purposes for which the concept of navigation is used tend to be unrelated. For example the beds of a stream may be privately owned at the same time the public has a right to enjoy the surface for recreation. It is therefore not surprising to find that the concept of navigability is really a bundle of concepts some varying substantively from others, each used for a different purpose.[9] Some of these concepts are governed by federal law. The concept used for determining the presence of public rights is governed by state law. Since the federal law, to the extent that it is directly in conflict with the state law, will supersede the state law, in order to know what rights of use apply to a particular stretch of watercourse, it is essential that some detailed understanding of the many-faced concept, navigability, be achieved in the different settings in which it is applicable.

B. *Consequences and Definitions of Navigability*

1. *To determine ownership of the beds of watercourses in new states*

a. *Effects of navigability.* There are several questions involved in deciding who owns the bed of a lake or stream. If riparian land was patented by the federal government to a private person prior to statehood and the watercourse was one side of the tract, did the patent include any part of the bed? The same question also occurs where the federal government retained public lands within a newly created state and granted patents to similar river or lakeside tracts after statehood. These questions are both determined by a federal test of navigability,[10] and are both answered the same way—if the watercourse was navigable, title to its bed is presumed not to pass to the patentee; if it wasn't, whether title to the bed passed is determined by the intention of the United States.[11] Usually the federal intention is said to be that the upland owner takes title as far as the thread of the stream.[12] Title to the beds of navigable watercourses within a newly created state passes to the state from the federal government as an incident of sovereignty[13]—except for those beds that might explicitly have been patented to private persons prior to statehood. Creation of a new state does not affect the federal title to the beds of non-

9. For a discussion of this phenomenon in the federal area, see Laurent, Judicial Criteria of Navigability and Federal Cases, 1953 Wis. L. Rev. 8.

10. United States v. Holt State Bank, 270 U.S. 49 (1926).

11. Laurent, supra note 9 at 18-19, citing cases. The presumption arises from the fact that in legislating on the subject of disposal of the public lands in a territory, Congress has acted on the theory that navigable waters in their beds should remain public highways and to that end should not be patented to individuals, but rather should be held by the United States in trust for the future states when created. Laurent, at 18-19.

12. E.g., State v. Bollenbach, 241 Minn. 103, 63 N.W.2d 278 (1954); Bingenheimer v. Diamond Iron Mining Co., 237 Minn. 332, 54 N.W.2d 912 (1952).

13. Laurent, supra note 9 at 19.

navigable watercourses.[14] In those states that were colonies prior to the American Revolution problems of the title to stream and lake beds are similarly resolved but with the British crown substituted for the federal government.[15]

Must a state retain title to stream and lake beds that came to it as an incident of sovereignty? No, it may do as it pleases with them.[16] Some states have decided to retain title to the beds of both streams and lakes, holding it in trust for the public for purposes of navigation and recreation.[17] Other states have come to the same conclusion with respect to lakes,[18] but beds of navigable streams are owned by the riparian subject to a public easement for navigation.[19] New York seems to agree with this latter view, except as to lakes the problem is one of practical construction. If the lake is "comparatively small and narrow," its bed may be in private ownership.[20] In disposing of the title to beds of navigable watercourses a state that was not one of the English colonies is bound by the federal test of navigability in the sense that it defines the beds to which the state acquired title in the first place. However, there is no theoretical objection to a state adopting a more restrictive definition if for some reason it is desired to retain title to some of the beds it received but to grant others to private persons. If this was done, then the test of navigability would be a question of state law rather than federal in deciding what beds had been granted by the state to private persons.

b. *Definition of navigability for bed title purposes.* The federal test of navigability in determining ownership of the beds of watercourses in states other than the original thirteen, is whether the watercourse, when the territory in which it is became a state, was used or was susceptible of being used in its ordinary condition as a highway for commerce over which trade and travel were or might have been conducted in the customary modes of trade and travel on water.[21] Furthermore, "navigability does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels or flatboats—nor on an absence of occasional difficulties in navigation,

14. United States v. Oregon, 295 U.S. 1 (1935); United States v. Utah, 283 U.S. 64 (1931).

15. Oelsner v. Nassau Light & Power Co., 134 App. Div. 281, 118 N.Y. Supp. 960 (2d Dep't 1909).

16. Barney v. Keokuk, 94 U.S. 324 (1876).

17. State ex rel. Dep't of Conservation v. Kivett, 228 Ind. 623, 95 N.E.2d 145 (1950) (Stream); Lake Sand Co. v. State, 68 Ind. App. 439, 120 N.E. 714 (1918) (Lake Michigan); State v. Adams, 251 Minn. 521, 89 N.W.2d 661 (1958) (Lakes and streams); State v. Longyear Holding Co., 224 Minn. 451, 29 N.W.2d 657 (1947) (Lake).

18. Cleveland Boat Service v. City of Cleveland, 102 Ohio App. 255, 130 N.E.2d 421, aff'd, 165 Ohio St. 429, 136 N.E.2d 274 (1956) (Lake Erie); State v. Cleveland & P. R. Co., 94 Ohio St. 61, 113 N.E. 677 (1916) (Lake Erie); State v. Public Serv. Comm., 275 Wis. 112, 81 N.W.2d 71 (1957).

19. Gavit v. Chambers, 3 Ohio 495 (1828); Muench v. Public Serv. Comm., 261 Wis. 492, 53 N.W.2d 514 (1952).

20. Granger v. City of Canandaigua, 257 N.Y. 126, 131, 177 N.E. 394 (1931).

21. United States v. Holt State Bank, 270 U.S. 49 (1926); Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77 (1922).

but on the fact, if it be a fact, that the stream in its natural ordinary condition affords a channel for useful commerce."[22] This language clouds the effect of having a federal test of navigability for the determination of bed ownership problems. The opinion containing the language quoted says navigability must be a federal question determined according to the federal rule, when it is asserted as a basis of a right arising under the United States Constitution, in order to achieve uniformity in operation of the Constitution. To apply varying state rules of navigability would cause the Constitution to operate in different ways in different states.[23] But the idea running through the quotation above is that streams in fact useful as highways of commerce, whatever the mode of use, are to remain public highways—they are navigable in the federal sense. Usual modes of use may vary among states with different social and economic environments. Thus, in the timber states before railroads were built it was customary to drive logs and lumber to market by streams and lakes. In such states the watercourse used or capable of being used in these drives would appear to meet the federal test of navigability. Logs can float in streams too shallow to float boats. Therefore, some streams in states containing no commercial stands of timber, and where water commerce has been conducted only by boat, do not meet the federal test, although they would if located in the timber producing state. The result that streams of equal size might be navigable in some states under the federal test but not in others appears to defeat the intention of the uniform application of the Constitution; but in reality the uniformity intended is achieved—all streams useful in commerce in their locality are preserved as public highways.

The opinion in *United States v. Utah,*[24] a suit by the United States to acquire title to the beds of certain portions of the Colorado River and some of its tributaries in Utah, contains language adopting this idea of uniformity. The Supreme Court remarks that navigability is a federal question in stream bed title cases, and states the standard to be whether a stream is susceptible to use as a highway in commerce, the Court further describing the test by quoting from *The Montello*:[25]

> ". . . The true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted nor the difficulty attending navigation. . . . It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway."[26]

Included in the portion of the river system found to be navigable in *United States v. Utah,* was a stretch of about three miles, containing rapids,

22. United States v. Holt State Bank, 270 U.S. 49, 56 (1926).
23. Id. at 55-56.
24. 283 U.S. 64 (1931).
25. 87 U.S. 430, 441-442 (1874).
26. United States v. Utah, supra note 24 at 76.

as to which the only type of commercial navigation mentioned was the rafting of lumber.[27] Surely this is an example of the highest federal court itself consciously interpreting the federal test of navigability used in bed title cases in the manner suggested previously. Futhermore, language in the opinion indicates the commercial purposes to which the stream is susceptible of being put need not have come into being at the time statehood was attained in order that title of the stream bed passed to the state. The Supreme Court said:

> "It is true that the region through which the rivers flow is sparsely settled. The towns of Green River and Moab are small, and otherwise the country in the vicinity of the streams has but few inhabitants. In view of past conditions, the government urges that the consideration of future commerce is too speculative to be entertained. Rather is it true that, as the title of a State depends upon the issue, the possibilities of growth and future profitable use are not to be ignored. Utah, with its equality of right as a State of the Union, is not to be denied title to the beds of such of its rivers as were navigable in fact at the time of the admission of the State either because the location of the rivers and circumstances of the exploration and settlement of the country through which they flowed had made recourse to navigation a late adventure, or because commercial utilization on a large scale awaits future demands. The question remains one of fact as to the capacity of the rivers in their ordinary condition to meet the needs of commerce as these may arise in connection with the growth of the population, the multiplication of activities and the development of natural resources. And this capacity may be shown by physical characteristics and experimentation as well as by the uses to which the streams have been put."[28]

The passage may be prophetic of the Court's attitude should the question be presented of the ownership of a stream or lake capable today of being used for recreational boating but which definitely was not capable of being used in the type of commerce known at the time statehood was attained. It has already been remarked that the business of furnishing the sportsmen who are engaged in recreational boating with boats and equipment is of substantial commercial importance and obviously is interstate in character. This interstate characteristic, it should be added, is found in the sport itself in some degree not precisely known. It is not unusual to find owners of cabin cruisers making trips across several states.[29] Perhaps today susceptibility to use for recreational boating is enough to cause a watercourse to be navigable for bed-title purposes.

27. Id. at 79. The finding that this stretch of water was navigable was made by a Special Master to which the court had referred the case. The recitation of the Master's finding is found at 73. The court's endorsement of it is found at 89.

28. Id. at 83.

29. Baum, "We Toured the Midwest in an Outboard," 230 Sat. Eve. Post 32 (Aug. 24, 1957) (describes 620 mile cruise from Terre Haute, Ind., to Grafton, Ill.); Smith, "We Drifted Down the River," 228 Sat. Eve. Post 17 (Mar. 3, 1956) (describes trip by houseboat from Council Bluffs, Iowa down the Missouri River to Boonville, Mo.).

2. To determine private vs. public rights—state law

a. *Effects of navigability.* In the eastern United States some watercourses may be used only by persons owning land along their banks.[30] The use of other watercourses must be shared in some respects by these riparian owners with the public. The first type of watercourse may be treated by the riparians living along its banks as though it were their own property, as, indeed, the bed is to the thread of the stream or center of the lake, but subject to certain limitations. Each riparian having the same rights, those of each are limited by those of the others and are called correlative. The right is defined to be one to make such use of the water as is reasonable. To be reasonable, a use must be made on the riparian land itself. If it results in a diminution of the quantity or quality of the water reaching downstream riparians or lakeshore neighbors, the diminution must be reasonable in light of the uses the other riparians are making of their waters. The riparian may not alter the course of the streams so as to change the place at which it passes off his property. On the other hand, he can fence off his own portion of the bed and exclude everyone from the surface overlying his beds. He may build structures in waters so long as they do not unreasonably impede the flow of water to his neighboring riparians.

On the second type of watercourse, the type which riparians must share with the public, the riparian cannot fence off his portion of the beds in a way that impedes the public's use of the surfaces although he still can prevent the public from reaching the water by crossing his land. The riparian still may build structures on the bed but in addition to the limitation of not impeding the flow unreasonably, there is the added restriction of not interfering with the public use of the water. The public right is often phrased by the courts as being paramount to the private rights, but in practice there has been a tendency to ban only the private uses that *unreasonably* interfere with the public rights. The public rights always include that of navigation and usually fishing, swimming and other forms of water recreation as well. The two different types of water-courses are distinguished on the basis of navigability, public rights being recognized only in those water-courses that are navigable.[31]

b. *Definition of navigability for public right purposes.* The test of navigability in this area of public and riparian rights has been left up to the individual states.[32] In at least one state the test is whether the watercourse in its natural state will float the lightest recreational craft.[33] This is the

30. This statement assumes a jurisdiction where no system similar to the prior appropriation theory of water rights has been adopted.

31. See VI-A Amer. L. of Prop. §§ 28.55-.57, .59, .60 (1954) for a general discussion of the riparian doctrine and public rights in water.

32. Fox River Paper Co. v. Railroad Comm. of Wisconsin, 274 U.S. 651 (1927); Hardin v. Jordan, 140 U.S. 371 (1891); Barney v. Keokuk, 94 U.S. 324 (1876).

33. Muench v. Public Serv. Comm., 261 Wis. 492, 506, 53 N.W.2d 514, 519 (1952).

modern equivalent of the old "sawlog" test used in logging days. If it will—even if only during the spring-time high water[34]—the stream or lake is navigable and impressed with public rights. This test results in finding more waters to be public than do the tests of some other states. Another test is that the watercourse was available and susceptible for navigation according to general rules of water transportation at the time statehood was attained.[35] In spite of language to the contrary in a case not involving public rights,[35a] New York's position today is a little different. It used the sawlog test in times past[36] and appeared still to recognize it in 1934.[37] However, no New York case has been found enforcing public rights in a watercourse not also susceptible to use in commerce.[38] A 1960 statute contemplates public regulation of all rights to use all water in the state.[38a] So far as recreational boating is concerned the statute seems to mean, at least as to waters for which a comprehensive plan of regulation is adopted, that any watercourse is navigable on which recreational craft will float. This is substantially the same as the sawlog test.

c. *Federal question in private versus public rights area.* Some states apply the same language in their test of navigability for riparian—public rights purposes as is used in the test employed for bed title purposes.[38b] In

34. Olson v. Merrill, 42 Wis. 203 (1877).

35. State ex rel. Ind. Dep't of Conservation v. Kivett, 228 Ind. 623, 95 N.E.2d 145 (1950); Bissell Chilled Plow Works v. South Bend Mfg. Co., 64 Ind. App. 1, 111 N. E. 932 (1916).

35a. Lewis v. Clark, 133 N.Y.S.2d 880 (Sup. Ct. 1954).

36. Morgan v. King, 35 N.Y. 454 (1858). New York was not as generous as Wisconsin in the logging period of the state in determining that a stream was navigable that would float logs for a relatively short period of the year. In Morgan v. King, 18 Barb. 277 (1854), it was declared that a brook that might carry saw logs for a few days during a freshet was not therefore a public highway but that a stream upon which saw logs in an unlimited amount might be floated every spring for a period of from four to eight weeks for a distance of 150 miles is a public highway.

37. Van Cortlandt v. N. Y. Central Railroad, 265 N.Y. 249, 192 N.E. 401 (1934) citing Morgan v. King, 35 N.Y. 454 (1858).

38. In People v. System Properties, 281 App. Div. 433, 120 N.Y.S.2d 269 (3d Dep't 1953) the court at 440, 120 N.Y.S.2d at 276 says the state's power of regulation of navigable water "is not limited to regulation in the interest of navigation but extends to every form of regulation in the public interest, including the regulation of the use of the lake as a means of recreation and enjoyment and as a source of waterpower." However, in finding the Ticonderoga River navigable, the court considered travel during the Revolutionary War. Although it is not explicitly stated, presumably this travel was commercial in character.

38a. N.Y. Conservation Law §§ 400-627, especially §§ 401, 403.

38b. New York in its recently enacted statute looking toward comprehensive planning of the use of water resources for all purposes including recreational, departs from the navigability concept in determining the waters to which the statute applies. The statute defines these waters to include all "bodies of surface or underground water, natural or artificial, inland or coastal, fresh or salt, public or private, which are wholly or partially within or bordering the state or within its jurisdiction." N.Y. Conservation Law § 403 (5). There seems no hazard that the meaning of this definition would be found to be a federal question. However, to the extent the definition includes waters not included in the sawlog test, and to the extent the statute adds uses to the public rights recognized by the common law, it may constitute a taking of the riparians' property for which compensation must be paid. Riparian rights have been treated as property in the constitutional sense when destroyed for some purpose other than improving navigation, In re West 205th Street in City of New York, 240 N.Y. 68, 147 N.E. 361 (1925), and all rights of use not within the public rights

the bed title cases the application of this language has been held to be a federal question. Does the fact that the states have used the same language in describing their test of navigability in the other context make its application in the riparian—public rights context a federal question too? There are indications in the cases that it does.

A federal statute makes inadmissible in evidence the records of telephone conversations intercepted without the consent of the person conversing.[39] The state of Texas by statute provided that evidence obtained in violation of the Constitution or laws of Texas or the Constitution of the United States shall be inadmissible.[40] Previously the Texas statute had excluded evidence obtained in violation of the federal statutes also. The Supreme Court decided that the federal wiretap evidence law does not bar admission of wiretap evidence in Texas state criminal proceedings, because of the careful way in which Texas revised its statutes to allow admission of evidence obtained in violation of a federal statute.[41] The Court refused to extend the federal statute by implication so as to invalidate the state statute on the subject, saying that Congress must clearly manifest its intention to act so as to supersede state power. The court said its decision would have been the same had the state law involved been judge-made rather than statutory.[42]

Now comes the comment of interest in the federal or state question context. In a concurring opinion, Mr. Justice Frankfurter said the Texas statute rendering inadmissible in criminal trials evidence obtained in violation "of the Constitution of the United States" might create a federal question. If the Texas law means that the Texas courts are to construe what is a violation of the United States Constitution, then there is no federal question, but if the statute means that the Texas courts are bound by what the United States Supreme Court deems a constitutional violation, then there might be a federal question.[43] If these remarks are followed in the future, a state by adopting a body of federal law for state purposes may open the door to appeal

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are exclusively the riparians'. If the public rights expand, surely the riparian rights have been taken. Even so, except where the riparian is prohibited from using the water at all, the statute might be upheld as a regulation of the use of property similar to zoning under the police power. City of New York v. Third Ave. Ry., 294 N.Y. 238, 62 N.E.2d 52 (1945).

New York continues to use navigability as the test of waters to which state regulation of vessel operation applies. N.Y. Navigation Law § 2(4) defines navigable waters of the state to be all lakes, rivers, streams and waters within the state and not privately owned which are "navigable in fact" or upon which "vessels" are operated. The definition of navigability in fact is the same as the federal test for bed-title purposes (N.Y. Navigation Law § 2(5)) but "vessel" means any floating craft including pleasure boats. The regulations do not apply to rowboats and canoes. This seems to boil down to saying that state control of navigation applies to all waters capable of floating recreational craft. The language of this test appears to be sufficiently different from the federal test to prevent its meaning from being a federal question.

39. 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1952).
40. Vernon's Tex. Stat. 1948 Code Crim. Proc. Art. 727a.
41. Schwartz v. Texas, 344 U.S. 199 (1952).
42. Id. at 203.
43. Id. at 204.

to the highest federal courts on matters which heretofore were determined by the state Supreme Court.[44]

3. To determine waters subject to federal admiralty jurisdiction

Another sense in which a federal test of navigability is used is determining the waters to which the federal admiralty jurisdiction extends. Original jurisdiction of civil admiralty cases exclusive of the state courts, is in the federal district courts.[45] The jurisdiction includes all cases of damage to persons or property "caused by a vessel on navigable water, notwithstanding that such

44. See also Standard Oil Co. of Calif. v. Johnson, 316 U.S. 481 (1942) (State License Tax, measured by gallonage, on privilege of distributing motor vehicle fuel excepted any such fuel "sold to the government of the United States or any Department thereof, for official use of said government." In determining that Army post exchanges were not "a government of the United States or any department thereof," the state court relied on its determination of the relationship of the post exchanges toward the federal government. This relationship is determined by construction of federal data, the regulations of the Secretary of War and the practices that have arisen under them, as well as relevant federal statutory and constitutional provisions. Therefore, the state court's determination was of a federal question and not binding on the federal court. But had the state court rested its conclusion entirely on state law that sales to the post exchanges were not within the exemption, then its determination would have been final as to the construction of the statute. Id. at 483. Other cases bearing on the point are A. C. Frost & Co. v. Coeur d'Alene Mines Corp., 312 U.S. 38 (1941); Fairport, Painesville & Eastern R. R. v. Meredith, 292 U.S. 589 (1934); Moore v. Chesapeake & Ohio Ry., 291 U.S. 205 (1934); Sage v. Hampe, 235 U.S. 99 (1914). In the Frost case the Supreme Court of Idaho's decision that a contract should not be enforced in state proceedings because it violated the Federal Securities Act of 1933, was struck down on the ground that there was no federal policy that contracts in violation of the Act should be considered void. Mr. Justice McReynolds remarks that since the Idaho Court's decision is based wholly on interpretation of the federal statute, a federal question arose. No mention is made of the possibility that the Idaho Court intended its interpretation to represent *state* policy in the matter rather than federal, and hence presented no federal question.

In the Fairport case, the United States Supreme Court was asked to review the construction of the Federal Safety Appliance Act, 45 U.S.C. §§ 1, 9, made by the Ohio Supreme Court. There was no difficulty in finding a federal question as to who was entitled to the protection of the Act and what duties it imposed. But the right to enforce the liability created by the Act was said to be exclusively a matter of state law, thereby making the Ohio Court's application of last clear chance to avoid the consequences of contributory negligence final. The decision seems unrealistic in its separation of the law creating the right from the law creating the remedy.

The Moore case is similar to the Fairport decision with respect to state law controlling remedies under the Federal Safety Appliance Act. But it also contemplates the adoption by a state, as part of its state law, of a federal statute applicable in interstate commerce, and that suits brought under the state statute are not suits arising under the laws of the United States. Therefore, a suit cannot be in the federal courts unless diversity of citizenship exists. However, questions arising in the state courts "relating to the scope and construction" of the federal statute are federal questions reviewable in the United States Supreme Court. 291 U.S. at 214. Here may be the same attitude as that of Mr. Justice Frankfurter in the Schwartz case. Construing the state statute could be said to be construing the Federal Act, since the state statute is in the same terms as the federal statute.

In Sage v. Hampe, a federal statute declaring any contract to convey certain Indian land entered into within a certain time void, was relied on as a defense in a state suit for breach of contract. The state court construed the statute to apply only to persons to whom the land had been allotted and ruled against the defendant because he was not such a person. Justice Holmes, speaking for the United States Supreme Court, in reversing the decision found the basis for the Supreme Court to act in the fact that the policy making the contract in question void stemmed from the federal statute and therefore was a policy of the United States, and as such made a federal question out of what otherwise would be simply a problem in applying the state doctrine of illegality of purpose of a contract.

45. 62 Stat. 931 (1948), 28 U.S.C. § 1333 (1954).

damage or injury be done or consummated on land."[46] The test of navigation in the admiralty sense is whether the water is used in commerce,[47] and even artificial waterways navigable in fact are navigable in law for admiralty purposes.[48] However, the admiralty jurisdiction does not extend to waters so situated that every marine transaction on them must commence and end within a single state.[49] The admiralty jurisdiction extends to pleasure craft,[50] but not when they are operated on waters on which no commercial interstate traffic is possible.[51]

a. *Possible future change in the admiralty test—what and why.* The test of navigable waters today in the admiralty sense is whether the waters are navigable in fact by boats engaged in commerce, the waters affording the possibility of interstate commerce. It seems possible this test may be expanded in the future to include waters entirely within one state and which are navigable in fact only by motor driven pleasure craft. The companies that build or repair the millions of pleasure craft presently in use in the United States obviously are engaged in interstate commerce, and have a substantial interest in seeing that the boat owners have waters available for pleasure cruising. Also, as the number of pleasure craft in operation increase, it is to be

46. 62 Stat. 496 (1948), 46 U.S.C. § 740 (1952).

47. In re Garnett, 141 U.S. 1 (1891); The Propeller Genesee Chief v. Fitzhugh, 53 U.S. 443 (1851). See Laurent, supra note 9 at 21-23.

48. Marine Transit Corp. v. Dreyfus, 284 U.S. 263 (1932) (New York State Barge Canal); Ex parte Boyer, 109 U.S. 629 (1883) (Illinois-Michigan Canal); The Anglo-Patagonian, 235 Fed. 92 (4th Cir. 1916) (Dry dock pumped dry to permit repairs on vessel within the dry dock).

49. Stapp v. Clyde, 43 Minn. 192, 45 N.W. 430 (1890). John B. Waite, Admiralty Jurisdiction and State Waters, 11 Mich. L. Rev. 580 (1913) includes a discussion of this case. See also the Robert W. Parsons, 191 U.S. 17, 28 (1903); Ex parte Boyer, 109 U.S. 629, 632 (1884); and United States v. Burlington & Henderson Ferry Co., 21 Fed. 331, 333 (S.D. Iowa 1884).

50. Note, Pleasure Boating and the Admiralty Jurisdiction, 10 Stan. L. Rev. 724, 725 (1958), citing petition of Colonial Trust Co., 124 Fed. Supp. 73 (D.C. Conn. 1954) and the Trim Too, 39 Fed. Supp. 271 (D.C. Mass. 1941). Coryell v. Phipps, 317 U.S. 406 (1943) did not explicitly discuss the jurisdiction question but was disposed of as a case in admiralty. The vessel involved was a pleasure yacht damaged while anchored in a yacht basin.

51. There seems to be no explicit decision of this point in the cases, but Waite, op. cit. supra note 49, takes the view that historically the admiralty jurisdiction arose in England due to the common use of the sea by many nations over the subjects of which the common law courts had no effective means of obtaining jurisdiction, and which the admiralty courts achieved by seizing the ship. Waite points out that there was nothing in the nature of transactions occurring on the sea that was essentially different from those occurring on the land that would cause a distinct body of law to evolve. Therefore, in the United States today, runs Waite's argument, considering the separate states as separate judicial powers, the reasons that created the admiralty jurisdiction on salt water apply equally to navigable fresh water that affords a highway of commerce with other states; but they do not apply at all to navigable fresh water that is wholly within one state. Considering concepts of proper basis for personal jurisdiction that are now evolving in the United States, one may wonder if there is reason for admiralty jurisdiction on any of the inland waters today, other than tradition, if Waite is right in saying there is nothing different in transactions on water that require a different body of substantive law. For discussion of bases for personal jurisdiction, see Foster, Personal Jurisdiction Based on Local Causes of Action, 1956 Wis. L. Rev. 522. Illinois has written the new broader bases of personal jurisdiction into its practice. Ill. Ann. Stat. ch. 110 §§ 116, 117 (Smith-Hurd 1956).

expected that marine accidents will increase. If there is any "expertise" advantage in having a special court handle the litigation arising from these incidents, it would seem that litigation involving pleasure craft cruising on water entirely within one state, on which only pleasure craft cruise, should be afforded this advantage as well as litigation arising from pleasure craft operating on water now within the admiralty jurisdiction.[52] Even if no such advantage exists, since pleasure craft when operating on admiralty waters are subject to admiralty jurisdiction and substantive law, in the interest of uniformity they should also be subject at least to its substantive law when operating on these other waters. The alternative of applying to these lawsuits the general, non-admiralty state and federal law would result in difficulty in predicting the liability of boat owners in accidents. To the extent that the nautical rules of the road might be different on the commercial and the recreational navigable water, accidents might be increased through confusion of the waters to which each set of rules applied.

b. *Reasons for not changing the admiralty test, but partially abolishing the admiralty jurisdiction.* A counter argument may be made that extension of the admiralty law to accidents occurring on intrastate waters prevents use of the law of a state with a legitimate interest in the incident to determine the liabilities accruing from the conduct in question. Furthermore, that there is nothing special in a marine accident that demands a special court to determine its consequences, and that problems of obtaining jurisdiction over the person of an out of state boater can be resolved through application of recently enunciated constitutional bases of personal jurisdiction.[53] People don't plan accidents and it is debatable how much admiralty law a pleasure boater knows anyway, so the point about predicting liability is not well taken. The result, this argument might run, of extending admiralty in the fashion proposed, is simply to eradicate a state's right of self-determination in the area of marine accidents without adequate justification.

A case that seems generally in agreement with the propositions stated is *In re Madsen's Petition.*[54] There an individual waterskier was struck by a pleasure speed boat on Lake Pleasant in Hamilton County, New York. The tort action was brought in the state court against the owner of the pleasure speed boat and the owner filed a petition in the Federal court for limitation of liability under the appropriate federal statutes.[55] The court dismissed the petition on the ground that Lake Pleasant was not navigable in the admiralty sense. However, in dictum the court indicated its feeling that limitation of liability is inappropriate where pleasure boating accidents are concerned,

52. For an opinion that there is no special expertise needed to handle maritime litigation, see note 51 supra.

53. Supra note 51.

54. 187 F. Supp. 411 (N. D. N.Y. 1960).

55. 9 Stat. 635 (1851), 46 U.S.C. §§ 181-189 (1952).

pointing out that the owner is a private individual usually covered by insurance and that:

> The financial protection and regulation necessary to alleviate the burden of society where the widow and orphan, maimed and crippled, are with us as a result of unfortunate highway accidents seem to me just as important in these boating accidents. Much of the complexity in this respect is for the legislative wisdom to solve, with realization that the general legislation on limitation may have harsh and oppressive impact in certain circumstances that may fairly and equitably be removed. Petition of Colonial Trust Company, D.C., 124 F. Supp. 73.[56]

It is not known whether counsel argued that pleasure boating itself now amounts to interstate commercial use of the water.

It seems to the writer that a case exists for not applying admiralty law with respect to pleasure boats of the United States operating on inland waters that harm the persons or property of residents of this country. But if the admiralty law should be applied to them on commercial waters, it is hard to see the justification for failing to extend it to the recreational waters as their use for navigation increases.

4. *To determine water subject to the federal commerce power.*

a. *Effects of navigability.* Vessels operating on waters navigable in the commerce power sense are governed by the federal rules of navigation,[57] the construction of power dams is regulated by the Federal Power Commission[58]

56. Supra note 54 at 413.

57. The federal rules are found in three sets of statutory provisions applicable to waters other than the high seas. The sets all cover the same general subjects of lights to be displayed, fog signals to be sounded, and steering and sailing rules to be observed. The navigation rules for inland waters generally are found in 33 U.S.C. §§ 151-232 (1952); the rules for the Great Lakes and their connecting and tributary waters as far east as Montreal, are found in 33 U.S.C. §§ 241-295 (1952); the rules for vessels operating on the Mississippi River and its tributaries are found in 33 U.S.C. §§ 301-356 (1952). Pleasure craft, in addition, are affected by the Motor Boat Act of 1940, 54 Stat. 163 (1940) as amended, 46 U.S.C. §§ 526-526u (1960 Supp.); and by the Federal Boating Program of 1958, 72 Stat. 1754 (1958), 46 U.S.C. §§ 527-527h (1960 Supp.). New York has statutes which generally cover the same area as the federal statutes. The state statutes are applicable both to federal and to state waters, but as to those waters that are navigable in the federal sense, they are applicable only to the extent that they do not conflict with the federal statutes or create dangerous confusion in the minds of sailors as the result of their difference. These statutes are found in the New York Navigation Law § 1-144. A detailed comparison of the New York statutes with the Federal statutes has not been attempted. However, cursory inspection reveals that with respect to pilot rules, New York has attempted to cause their rules to coincide with the federal rules through giving the Conservation Commissioner authority to modify or change the rules as necessary to accomplish this end. New York Navigation Law § 41(6); and further it appears that the light requirements laid down by the New York law are the same as the requirements of the federal law pertaining to motor boats. See New York Navigation Law § 43. The state is to be commended in this effort since one threat to continued state sovereignty over waters which today are not within the federal jurisdiction is the possibility that the state navigation rules and light display requirements might be so different from those applying to federal water, that sailors versed in the state rules would constitute a hazard to safe operation on the federal waters.

58. 41 Stat. 1075 (1920) as amended, 16 U.S.C. § 817 (1952). The license require-

and the erection of a bridge or other obstruction must be authorized by Congress and approved by the Army.[59]

b. *Definition of navigability for commerce power purposes.* Navigable waters might be defined differently within the commerce power context each time a different consequence was involved. Thus the same reach of the watercourse might be within the jurisdiction of the Federal Power Commission, or the Department of the Army, yet the federal navigation rules might not apply to it. The practice of the Coast Guard in enforcing the federal rules on waters improved by the Army Corps of Engineers, however, is some indication that a distinction is not being made in two of the three fields,[60] an indication that is borne out by the court decisions.[61] A watercourse is navigable for these two facets of the commerce power if it is capable of being used by the public for purposes of transportation and commerce, no matter in what mode the commerce may be conducted, even though natural barriers such as rapids and sandbars make navigation difficult.[62]

There is no clear indication that the test is necessarily different in the Federal Power Commission setting. The more recent cases[63] usually have arisen in this field and have greatly expanded the waters that are navigable without saying whether the expansion applies in the navigation rules and channel obstruction fields as well, although sometimes citing the navigation and obstruction cases as authority. Speaking broadly, it appears that those waters are navigable as to which there is good reason that the Federal Power Commission exercise authority. In other words, the test is as flexible as the need of federal regulation of commerce, and so expressed no doubt the test is the same as that used in the navigation rules or channel obstruction

ment applies to state and municipal governments, as well as individuals and corporations. 41 Stat. 1063 (1920) as amended, 16 U.S.C. § 796 (4) (1952).

59. 30 Stat. 1151 (1899), 33 U.S.C. § 403 (1952). It is interesting to note that this section has been used as the basis for federal intervention to abate pollution of navigable waters by industrial solid matter, on the theory that the pollution constitutes an obstruction to navigation. See United States v. Republic Steel Corp., 362 U.S. 482 (1960).

60. Mr. Orvin L. Helstad, of the Wisconsin Legislative Council asked the Coast Guard to what Wisconsin waters it thought its jurisdiction extended, and whether it patrolled all or only a portion of these waters. Letter from Helstad to U.S. Coast Guard dated Dec. 12, 1957. In reply, by letter dated Jan. 14, 1958, Admiral E. H. Thiele, then Commander, 9th Coast Guard District stated that "Certain rivers that have been improved by the Corps of Engineers have been declared by that agency to be navigable waters of the United States throughout all or part of their length." The Admiral listed a few rivers that had been held navigable but said it was impossible to list all the Federal navigable waters in the state. The Admiral said the Coast Guard recognizes its responsibility to enforce the federal statutes on all these waters but indicated it didn't have enough men or equipment to do so.

61. Rules of Navigation Cases: The Montello, 87 U.S. 430 (1874); The Daniel Ball, 77 U.S. 557 (1870). Obstruction cases: Leovy v. United States, 177 U.S. 621 (1900); United States v. Rio Grande Irrigation Co., 174 U.S. 690 (1899). The test of navigability used in The Montello is also used in the Rio Grande case. 174 U.S. at 698-699. See Laurent, supra note 9, at 23-29.

62. The Montello, 87 U.S. 430 (1874).

63. E.g., United States v. Twin City Power Co., 350 U.S. 222 (1956); United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940); Wisconsin v. Federal Power Commission, 214 F.2d 334 (7th Cir. 1954).

cases. The precise waters over which federal authority needs to be exercised may be different in the different fields, however.

c. *Conclusion.* Control of activity on inland waters in the first instance is in state hands. However, as the activities take on increasing interstate significance, the federal government acquires power to control the activity as well. A federal regulation actually imposed and enforced prevents state regulations in direct conflict with it from being enforced. Some states inadvertently may have given up their control over public rights through using the same language to describe waters in which public rights exist as the federal government uses in determining watercourses in states created from the public domain, the title to the beds of which passed to the states.

STATE POWER TO ZONE WATERS TO PARTICULAR USES.

In light of the present status of the dual federal-state control of activities on water and liability for their consequences, may a state in attempting to cope with the problems outlined at the beginning of this article pertaining to pleasure boating, zone waters to particular uses? New York has adopted a statute that allows counties, or failing action by counties, cities or incorporated villages to establish a vessel regulation zone within which the speed of operation of vessels apparently is restricted, and possibly other aspects of their operation as well.[64] Should a community determine to zone the vessels that could be operated within the regulation area to rowboats only, say, or inboard cruisers and rowboats, would this be valid in the face of the federal regulations and interest in interstate commerce previously discussed? Would it be contrary to the admiralty jurisdiction of the United States and the maritime laws that have been promulgated, possibly pursuant to the admiralty jurisdiction?

It is unlikely that such a regulation infringes federal law. The United States Supreme Court recently determined[65] that a municipal smoke abatement ordinance was enforceable even though its enforcement required that certain marine boilers installed in vessels engaged in interstate commerce be replaced. The Court was not impressed that the local regulation imposed an undue burden on interstate commerce and remarked on the interest felt in the nation at large today in seeing that localities solve local problems of urban land use.[66] The Court did indicate that such regulations may be struck down in the future if different cities establish different standards to which navigation interests will be required to comply. If the difference in standards is so common and so drastic as to constitute an undue harassment of the shipowners then the Court may strike down the regulations.[67] The hint is clear that localities interested in regulating navigation should attempt among them-

64. N.Y. Navigation Law § 46.
65. Huron Portland Cement Co. v. Detroit, — U.S. —, 80 S. Ct. 813 (1960).
66. Id. at —, 80 S. Ct. 817.
67. Id. at —, 80 S. Ct. 819.

selves to achieve a uniform regulation and if this attempt is reasonably successful, the Court appears willing to uphold it against attacks that it constitutes an undue burden on interstate commerce.

The case bears importantly on the problem of regulating vessel navigation. By analogy, a city or county regulation zoning a particular surface area of a watercourse to navigation by certain specified types of craft will probably be upheld by the Supreme Court. The New York statute authorizing local regulation of vessels has within it a feature that tends to promote uniformity of local regulations. The local authorities are required to submit the proposed zone limits and regulations that are to be imposed within the zone to the state conservation commissioner for his approval.[68] Thus, the conservation commissioner is in a position to know the specific regulations that are attempted to be imposed by the various communities and through his own good offices can exert strong pressure to have those regulations uniform as a condition of his approval. If this practice is followed, it would seem that the regulations are likely to be upheld and enforced. Of course, on those waters which are not navigable in the commerce power sense, there will be no question of conflict with the federal law because such waters are not within the federal jurisdiction.

However, the New York statutes fail to require zoning of navigable waters on a state-wide basis to various different uses in accordance with a general plan. Legislative findings accompanying the passage of a new Water Resources Law[69] recognize that public recreational use of the state's waters has increased greatly in recent years, both by fishermen and hunters and by pleasure boaters. The findings state that consideration must be given in water resource planning and development "to the needs of fisheries and waterfowl and to swimming, boating and other forms of outdoor recreation made possible by the state's waters."[69a] The legislature states these findings shall be taken into account in construing and administering the declaration of policy contained in the statute. In pertinent part this declaration is that the "regulation and control of the water resources of this state shall be exercised only pursuant to the laws of this state"[70] and that "comprehensive planning be undertaken for the protection, conservation and development of the water resources . . . [so] that they shall not be wasted and shall be adequate to meet the . . . needs for domestic, municipal, agricultural, commercial, industrial, recreational and other public, beneficial purposes."[71]

The New York State Water Resources Commission has power of its own motion to make surveys and investigations[72] that might form the basis for

68. N.Y. Navigation Law § 46.
69. N.Y. Conservation Law §§ 400-627 (Supp. 1960). The findings are printed as an annotation accompanying § 400 of the statute.
69a. Ibid.
70. N.Y. Conservation Law § 401 (1).
71. Id. (2).
72. Id. § 420 (1).

zoning, but zoning itself is not authorized. Local government may cause regional planning boards to be created to formulate a comprehensive plan for the conservation, development, and use of the water resources of a specified region of the state,[73] but even the regional planning boards are not given zoning powers. The statute does say the regional planning and development board is to survey the water resources of the region to determine the present uses being made of the water and to determine the feasibility of the uses' future development "by proper conservation and control measures, to provide a greater supply for, and an equitable distribution among domestic, municipal, agricultural, commercial, industrial and recreational users . . ."[74] Zoning would appear to be a proper control measure and hence a zoning scheme might properly be included in the comprehensive plan for development of the region's water resources that the regional planning board is to formulate.[75]

The statute attempts to assure that, although the plans are regional in their inception, a state-wide matrix of control will result by requiring the plans to be reviewed by the State Water Resources Commission following public hearing.[76] The Commission is to determine, among other things, whether the plan conflicts with other regional plans and "would be just and equitable to the interests of other areas of the state."[77] The statute does not explicitly say so, but the implication is that a plan that conflicted with another or was unjust to another region of the state would be disapproved. Even so, it is doubtful that the recreational uses of water can be efficiently planned and controlled on a regional basis. True, zoning a particular reach of water to waterskiing between certain hours of the day during certain periods of the year may not conflict with other regional plans and it may be impossible to show clearly that it is unjust to another region. But the effective demand for waters for this sport is likely to come from several different regions or states. The entire area from which the demand springs should be considered in determining the waters to be devoted to this use, not just a portion of it. Decisions are being made as to water uses in which many persons with an interest are not allowed an active part in the initial decision making process. Allowing participation in the review process is an inadequate substitute. Many decisions that would never have been made had additional persons been deciding, still are not so different from what the additional persons would have done that they can be upset.

Whether this deficiency is so serious as to render regional controls of recreational water use arbitrary and therefore unconstitutional is debatable. Early land use zoning cases sustained zoning ordinances affecting only one

73. Id. § 436 (1).
74. Id. § 437 (12).
75. Id. § 437 (16).
76. Id. § 438 (2), (3).
77. Id. § 438 (3)(b).

use,[78] even if the control operated in only a portion of the city.[79] Even in modern zoning cases a court sometimes says a city zoning plan may meet the requirement of comprehensiveness if it only applies to a large part of the city.[80] But the trend of land use around cities, with the development of limited access highways, has been for people and businesses to move from the central city into the suburbs and into what formerly had been the country. A comprehensive plan in such an environment can only be prepared if the entire metropolitan area is considered. Plans by isolated units of government within the metropolitan area are reviewed by courts that consider the plan's impact on the region in passing on its validity.[81] The same consciousness of the area affected by the land use decisions embodied in the water zoning scheme may be expected when it is given judicial scrutiny. The fact that the entity submitting the plan of water zoning purports to encompass a cohesive, rational region whereas the suburb in a metropolitan area does not, further highlights the necessity that the water use plan actually encompass the entire area the plan affects. Zoning water uses at the state level has an even better claim to constitutionality than does local zoning of water uses.

A more serious defect of the present New York law than allowing local zoning is that it does not assure that any plan for control of recreational uses of water will be formulated. No one is required to devise a plan, only permission to do so is given. If the state is sincere in its stated policy that regulation of New York water resources is to be done only by state law, this deficiency should be quickly corrected and the planning of controls to allow each form of recreation its proper chance for enjoyment should soon begin. The federal government is sympathetic to state control in the area of water recreation. However, a consideration of the courts' treatment of the scope of federal jurisdiction under both the commerce and admiralty powers reveals a basic philosophy of extending that jurisdiction to whatever waters on which the jurisdiction is thought necessary in order to protect the federal interest. It is clear that state and local authorities must be as active and vigorous in regulating boating and other water sports as the facts of conflicting water use require if the state's power to govern is to go undiminished on state waters that are now navigable for public right purposes but which perhaps are not now navigable for federal commerce or admiralty purposes. Should state regulation prove inadequate, and danger to life and property become serious or substantial or conditions develop in which recreational use of the water

78. St. Louis Poster Advertising Co. v. St. Louis, 249 U.S. 269 (1919) (Billboards prohibited); Thomas Cusack v. Chicago, 242 U.S. 526 (1917) (Billboards prohibited); Welch v. Swasey, 214 U.S. 91 (1909) (Building height districts in Boston upheld).

79. Hadacheck v. Los Angeles, 239 U.S. 394 (1915).

80. Bartram v. Zoning Commission, 136 Conn. 89, 68 A.2d 308 (1949), citing Bishop v. Board of Zoning Appeals, 133 Conn. 614, 53 A.2d 659 (1947).

81. State ex rel. Anshe Chesed Congregation v. Bruggemeier, 97 Ohio App. 67, 115 N.E.2d 65 (1953); Burrough of Cresskill v. Burrough of Dumont, 15 N.J. 238, 104 A.2d 441 (1954).

is seriously inhibited, the possibility exists and in fact amounts to a probability that the federal jurisdictions will be expanded in order to protect the federal interest. Manufacturers of boats and motors, mindful that their business can remain healthy only if there are waters on which their products can be safely, conveniently and pleasurably used, may be relied on to see to that. A state and people interested in governing themselves and determining their own conduct are thus in effect forced to exercise their power to enhance safety and reduce friction among conflicting water uses through zoning waters to particular uses and imposing liability for damage caused by water users, in order to preserve the power from being swallowed in an expansion of federal power. State sovereignty should not be allowed to diminish simply through default.